

CANADA / JUDGMENT

R. v. Harroff

2024 BCSC 318

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Supreme Court of British Columbia

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2024 BCSC 318 R. v. Harroff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Harroff,

2024 BCSC 318

Date: 20240222

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Registry: Fort St. John

Rex

v.

George Joseph Harroff

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Before: The Honourable Justice Majawa

Oral Reasons for Sentencing

Counsel for the Crown:

D. Wightman

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N. Bauder

Place and Dates of Sentencing:

Fort St. John, B.C.

December 12, 14, and 21, 2023

Place and Date of Judgment:

Fort St. John, B.C.

February 22, 2024

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I. INTRODUCTION

- [1] On August 20, 2023, Tyler Harroff pleaded guilty to two Criminal Code offences - making child pornography contrary to section 163.1(2); and transmitting child pornography contrary to section 163.1(3). His offending occurred in relation to the video recording of the sexual assault of a 13-year-old girl, D.V., at a party on November 7, 2020. Mr. Harroff did not take part in the sexual assault of D.V.; however, he did record two individuals having sex with her and then sent those videos to a number of his friends via social media.
- [2] The Crown seeks a sentence of imprisonment of two years less a day, consisting of one year on one count and one year less a day on the other to be served consecutively. The Crown submits that this should be followed by one year of probation.
- [3] Mr. Harroff submits that the appropriate sentence is a conditional sentence order ("CSO") with strict conditions for a period of 18 months followed by a period of one year of probation.
- [4] The Crown and defence also take different views with respect to whether Mr. Harroff should be required to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA] in light of recent amendments which provide the Court with the discretion to exempt offenders from registration in certain circumstances.

II. CIRCUMSTANCES OF THE OFFENCE

- [5] The following circumstances of the offences are taken primarily from the agreed statement of facts ("ASF") filed at the sentencing hearing.
- [6] On November 7, 2020, Mr. Harroff, then 18 years of age, travelled to Fort St. John from Chetwynd, BC. He attended a restaurant with D.V., and a number of other individuals who were between the ages of 17 and 20. One of the individuals at the restaurant was Anthony Collins. Mr. Collins was one of the individuals that Mr. Harroff recorded having sex with D.V. Mr. Collins was charged with the sexual assault of D.V. and he pleaded guilty on July 20, 2023. He was sentenced to three years incarceration pursuant to a joint submission from the Crown and defence. The circumstances of Mr. Collins' involvement are discussed by the sentencing judge in *R v. Collins*, 2023 BCSC 1287.
- [7] Mr. Harroff knew Mr. Collins and some of the other individuals at the restaurant that evening but he had not met D.V. before. After the group left the restaurant, they purchased alcohol and went to the residence of L.G. who was 17 years old at the time. There were other friends of L.G. at the residence and the event turned into a house party.
- [8] Mr. Harroff consumed alcohol before and during the house party, although there is no indication as to how much he consumed or whether he was intoxicated.

- [9] Mr. Harroff, used his cell phone camera to record a 17-year-old male and Mr. Collins having sex and engaging in sexual activity with D.V. in two of the bathrooms at the residence where the party was underway.
- [10] The videos were not tendered at the sentencing hearing; however, the description of those videos in the ASF leave no doubt that they are graphic and disturbing. They depict one individual having intercourse with D.V. and at one point another individual enters the bathroom, grabs D.V. in the breast area and urinates on the two of them. The other video depicts Mr. Collins having sexual intercourse with D.V.
- [11] After recording the sexual activity, and while still at the house party, Mr. Harroff sent videos of the sexual activity via Snapchat to three or four individuals who were at the restaurant and the house party, including Mr. Collins.
- [12] Mr. Harroff did not know that D.V. was 13 years of age either before or during his presence at the house party. According to the ASF, Mr. Harroff had heard from individuals at the house party, and before recording the videos, that D.V. was 17 or 18 years of age. Approximately two or three weeks after the house party, Mr. Harroff found out from an acquaintance that D.V. was 13 years of age.
- [13] Mr. Harroff is aware through the RCMP investigation that people other than those that he directly shared the videos with are aware of the videos through other people sending, displaying, or showing the recordings to them by social media or other means.

Victim Impact Statement

- [14] D.V. read her victim impact statement about the effect and impact that the recording and distribution of the videos of the sexual assault had on her. She told the Court that she has experienced a great deal of pain, sadness, anger, grief and humiliation arising from Mr. Harroff's actions. She has had difficulty attending school in the years since and stated that her life "went to hell" after the incident and this was in large part because of the existence of the videos. She said that if Mr. Harroff had never recorded the videos, her experience would not have been as bad as it has been since the sexual assaults occurred.
- [15] I have considered her statement very carefully and it has been of assistance in appreciating the impact the offences have had on her. I have no doubt that the impact upon her is significant in almost every aspect of her life.
- [16] D.V. endured the traumatizing experience of being sexually assaulted by more than one person that evening at the house party. In addition, she has to live with the fact that recordings were made of those assaults and shared with others. These recordings were made when, as she appropriately described, she was in her absolutely most vulnerable state.

III. CIRCUMSTANCES OF THE OFFENDER

- [17] Mr. Harroff was 18 years old at the time of the offence and was 21 years old at the time of sentencing. A presentence report ("PSR") was prepared and entered as an exhibit on the sentencing hearing. Both the Crown and the defence characterize the PSR as being relatively positive.
- [18] Mr. Harroff was born in Chetwynd BC. He comes from what his counsel describes as a good family. Mr. Harroff recalls having a stable childhood and that he continues to have a close relationship with his parents. His father provided information to the PSR writer and his mother showed her support by attending the sentencing hearing with him. However, no letters of support from Mr. Harroff's friends, family members, or employer were tendered at the sentencing hearing.
- [19] Mr. Harroff reports that he was bullied in school but that he now feels confident in managing his social situations. It appears that Mr. Harroff's social circle was quite large before his arrest but since his arrest he now keeps a very small circle of friends. Mr. Harroff chose to stop speaking with some of his previous friends and there were also a number of former friends who cut off contact with him because of the charges he faced. As I understand it, Mr. Harroff no longer associates with the individuals involved in the sexual assault that evening. He has moved away from Chetwynd, found new friends, and he regrets having been friends with the individuals involved in the events that evening.
- [20] Mr. Harroff has had some romantic relationships. There does not appear to be anything out of the ordinary that would raise any concerns, such as abuse of partners, noted in respect of these relationships. It appears that Mr. Harroff has recently begun a relationship with a woman online that he considers to be romantic.
- [21] Mr. Harroff attended and graduated from the local high school in Chetwynd. He was part of the air cadets for a period of three years while in high school.
- [22] Mr. Harroff entered the workforce at 13 years of age when he began part-time employment which he maintained throughout high school. He has changed employment on a number of occasions but has maintained regular employment throughout his working life. Since finishing high school, Mr. Harroff has worked as a labourer in the forestry and oil and gas industry. He is currently employed, full-time, as an equipment operator. He started with this company as a labourer and parts runner and moved his way up to his current position. He has a number of current trade qualifications which his counsel referred to as "oil and gas tickets". Mr. Harroff currently lives independently without significant support from his parents, beyond what would reasonably be expected for a 21-year-old.
- [23] Mr. Harroff acknowledges to having some struggles with impulse control in respect of his spending habits. This has caused him to enter a consumer proposal for a considerable amount of money which he pays in addition to his regular living expenses. Mr. Harroff did not link the stress from his financial situation to the reasons that he committed the offences.

- [24] Mr. Harroff has not reported any struggles with depression, anxiety, or other mental health issues and nor were any of these concerns reported by any of the individuals that the PSR writer contacted. There is no evidence of any concerns in respect of Mr. Harroff's sexual functioning and nor does it appear that he has any significant deficits in generating and maintaining intimate relationships.
- [25] Mr. Harroff says that has never used any substances beyond alcohol and cannabis. Mr. Harroff and his friends would consume alcohol heavily on the weekend when he was younger; however, he says this never interfered with his attendance at work or school and did not cause issues in other aspects of his life. Currently, Mr. Harroff says that he drinks moderately and only rarely. He states that he has not consumed cannabis in the last two years.
- [26] Mr. Harroff takes responsibility for his actions in committing the offences and has demonstrated some remorse. In the comments he made to the Court at the sentencing hearing, he described his actions on the evening of November 7, 2020, as being a "very big mistake". He acknowledged that he was wrong to have recorded the sexual activity and he expressed remorse for the "trouble" he has caused D.V. Mr. Harroff recognizes that D.V. would have been embarrassed and would have had trouble going to school because of the existence and sharing of the videos. He also acknowledged that the videos may impact her in the future if they are to resurface.
- [27] Mr. Harroff denies that the videos were intended for, or were ever used for, a sexual purpose. Mr. Harroff told the PSR writer that he made the decision to start filming because other people were laughing and he believed it was funny at the time. He says he shared the videos as a means of engaging with an inside joke amongst those people who were present that evening. Mr. Harroff maintained that he only shared the videos with others who were already direct witnesses to the sexual activity, and at the time, he did not think about those videos being shared more broadly.
- [28] Mr. Harroff has not been subject to any community supervision orders in the past; however, the PSR writer said that he had a positive attitude in participating with the preparation of the PSR. Mr. Harroff has also confirmed that he does not have any objection to reporting conditions or sexual behaviour programming or counselling. He has demonstrated insight and understanding of the importance of complying with counselling and other programming relevant to the offences. However, Mr. Harroff has not taken it upon himself to begin any sort of counselling program in the more than two years since he was arrested.
- [29] Mr. Harroff has no previous involvement with the criminal justice system.

[30] Both the Crown and the defence suggested that the likelihood of Mr. Harroff reoffending is low. Unfortunately, I do not have the benefit of a psychiatric assessment before me and the PSR writer does not express any view with respect to the likelihood of re-offending. Nonetheless, given the statements of counsel, the contents of the PSR, and the circumstances of this case, I accept that the likelihood of Mr. Harroff reoffending is low.

IV. PRINCIPLES OF SENTENCING APPLICABLE TO THIS CASE

[31] The principles of sentencing are found in s. 718 of the Criminal Code, R.S.C. 1985, c. C-46 [the "Code"]. That section states that the fundamental purpose of sentencing is to "protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:"

- to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- to deter the offender and other persons from committing offences;
- to separate offenders from society, where necessary;
- to assist in rehabilitating offenders;
- to provide reparations for harm done to victims or to the community; and
- to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[32] Justice Donegan comprehensively set out the remaining relevant legislative framework and principles of sentencing at paras. 107 - 113 of *R. v. K.M.*, 2022 BCSC 360, and I have relied on her comprehensive summary of the law in my consideration of the appropriate sentence in this case. My summary of the relevant factors follows.

[33] Because the offences in this case involve the abuse of a person under the age of 18, s. 718.01 of the Code requires me to give primary consideration to the objectives of denunciation and deterrence when imposing a sentence. In *R. v. Friesen*, 2020 SCC 9 at para. 105, the Supreme Court of Canada explained Parliament's choice to give the objectives of denunciation and deterrence priority in cases that involve sexual offences against children:

Parliament's choice to prioritize denunciation and deterrence for sexual offences against children is a reasoned response to the wrongfulness of these offences and the serious harm they cause. The sentencing objective of denunciation embodies the communicative and educative role of law (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 102). It reflects the fact that Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values"; it "instills the basic set of communal values shared by all Canadians" (*M. (C.A.)*, at para. 81). The protection of children is one of the most basic values of Canadian society (*L. (J.-J.)*, at p. 250; *Rayo*, at para. 104) .

- [34] Secondary sentencing principles are provided for in s. 718.2 of the Code and include the requirements that I consider aggravating and mitigating circumstances and the principles of parity and totality. Parliament has also instructed that an offender should not be deprived of liberty if less restrictive sanctions would be appropriate, and that I must consider "all available sanctions other than imprisonment that are reasonable in the circumstances." Thus, I am to exercise restraint in the use of imprisonment.
- [35] Section 718.1 of the Code emphasizes the fundamental requirement that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality in s. 718.1 remains fundamental and interacts with the other sentencing objectives set out by Parliament. In *R. v. Ipeelee*, 2012 SCC 13 at para. 37, Justice LeBel, writing for the majority, emphasized that proportionality is the essential component of a just sanction:

Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

- [36] Applying LeBel J.'s reasoning to this case means that a proportionate sentence for Mr. Harroff must reflect the gravity of the offences to which he has pleaded guilty. The gravity of the offences are, in turn, closely tied with what are the primary objectives of sentencing in this case: denunciation and deterrence. A proportionate sentence that properly considers these factors will promote justice for victims in general, and D.V. in particular, as well as the public's confidence in the justice system itself. Mr. Harroff's moral blameworthiness in committing the offences is an important factor to be considered to ensure that his sentence does not exceed what is appropriate. A fit, just, and proportionate sentence for Mr. Harroff must reflect all of these considerations.
- [37] Finally, as explained by the Supreme Court in *R. v. Lacasse*, 2015 SCC 64, to ensure that a sentence for Mr. Harroff is proportionate, I must consider proportionality as it relates to Mr. Harroff himself and the offences he has committed as well as by comparison with sentences imposed for similar offences committed in similar circumstances. As will be discussed, applying the principle parity of sentences in this case is particularly challenging.

V. DISCUSSION

The Appropriate Range of Sentences

- [38] My review of the case law reveals that the sentences for making child pornography contrary to s. 163.1(2) of the Code range from three to 36 months imprisonment. At the lowest end are cases such as *R v. Massey*, 2021 ABQB 146 which involved the creation of a relatively small amount of written child pornography. In the middle are cases such as *R v. Wood*, 2021 NSSC 253, where the offender was sentenced to one-year imprisonment for making videos of his sexual interference with a 15-year-old victim. The cases at the higher end of this range involve offenders who created child pornography with the knowledge that doing so would exploit those children, were in a position of trust, or where it was carried on over a long period of time. I refer to cases such as *K.M.* where Donegan J. sentenced the offender to 30 months' imprisonment for creating child pornography of a 15 year-old child by way of a hidden camera in a bathroom and *R. v. G.J.M.*, 2015 MBCA 103, where a three year sentence was upheld where the offender made recordings from a camera placed in a bathroom that recorded three 8-year old girls and then altered images to have the image of his friend's prepubescent daughter spliced over child pornography he already possessed.
- [39] In respect of the range of sentences for distributing child pornography contrary to s. 163.1(3) of the Code, I find that the jurisprudence suggests a range of between four and 36 months. As with the decisions imposing sentences for production, the cases involving distribution have a wide variety of circumstances. At the lower end of the range are cases such as *R. v. Mollon*, 2019 BCSC 423, where the offender was sentenced to six months incarceration for exchanging two images of child pornography online. Although the distribution was an isolated event, the court held that it was a deliberate, premeditated act to proliferate child pornography. Notably, this decision was rendered before the Supreme Court of Canada's decision in *Friesen*. At the higher end are cases such as *R. v. Coban*, 2022 BCSC 1810, where the offender was sentenced to three years imprisonment for widely distributing child pornography in a particularly targeted and disturbing case of "sextortion" involving a teenage girl. In *R. v. Prince*, 2018 BCSC 987, the offender was sentenced to three years imprisonment for distribution of child pornography in respect of hundreds of images and some videos that the offender made available to another individual to download from his computer.
- [40] Both Crown and defence counsel pointed to cases involving sentencing for offenders convicted of offences involving the distribution of intimate images without consent which is an offence pursuant to s. 162.1 of the Code. From my review of the jurisprudence in this area, offenders convicted of this offence have received sentences ranging from CSOs to 18 months imprisonment. In one case which I would consider to be an outlier, an offender received a conditional discharge: *R. v. Calpito*, 2017 ONCJ 129. Other cases involving s. 162.1 of the Code that I have reviewed include: *R. v. Haines-Matthews*, 2018 ABPC 264; *R. v. A.C.* 2017 ONCJ 317; *R. v. B.H.*, [2016] O.J. No. 7080, *R. v. M.R.*, 2017 ONCJ 943; and *R. v. J.B.*, 2018 ONSC 4726.

- [41] I find the sharing of intimate images cases to be of limited assistance. In those cases, the victim often had consented to the photographs being taken and some of the cases did not involve explicit sexual activity. I was not pointed to any that involved the sexual assault of a victim, much less a 13-year old victim. On the other hand, some of those cases involved offenders who shared those images with an element of malice, which does not exist in this case. While I acknowledge that the way in which the videos were shared in this case could be more akin to the cases involving the distribution of intimate images, the content of the videos in this case, including the nature of the activity depicted therein, is very different from those cases.
- [42] In *R. v. B.C.M.*, 2008 BCCA 365, our Court of Appeal considered sentencing ranges for making child pornography. The Court reviewed several authorities and said this:
- [43] I find it difficult to discern any clear guiding principles from these decisions for two reasons. First, there are many variables in offences of this nature [making child pornography]. These include the age and number of complainants; the duration, frequency and severity of the sexual exploitation and abuse; whether or not the offender stood in a position of trust with respect to the victims; whether the offences involved violence; whether they had a commercial aspect; the background of the offender; and the number and constellation of charges on which the offender is being sentenced. I find none of these cases sufficiently similar to the one at bar to be of assistance.
- [Emphasis added.]
- [43] Neither counsel was able to provide me with a decision with substantially similar facts to those of the case at bar and I was unable to find any. In my view, the Court's comments in *B.C.M.* are apposite to the case at bar and equally apply to the crime of distributing child pornography. I too find the cases that I have reviewed to be of limited assistance as they are not sufficiently similar to the case at bar.

Proportionality and Moral Blameworthiness

- [44] As discussed above, pursuant to s. 718.1 of the Code, the fundamental principle of sentencing is that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".
- [45] The way in which the gravity of the offence and the degree of responsibility of the offender relate to a proportionate sentence was discussed in *Ipeelee*. There, the Court held that a sentence that properly reflects the gravity of the offence is closely tied to the objective of denunciation; it promotes justice for victims and ensures public confidence in the justice system. As discussed above, Parliament has mandated that the objectives of denunciation and deterrence are primary objectives in this case.

[46] The Court in Ipeelee also held that a sentence that properly reflects the degree of responsibility of the offender ensures it does not exceed what is appropriate given their moral blameworthiness; it serves a restraining function and ensures justice for the offender.

[47] The relevant factors that are engaged in the assessment of an offender's moral blameworthiness were recently discussed by the Court of Appeal in *R. v. C.K.*, 2023 BCCA 468. At para. 71, Justice DeWitt-Van Oosten held that the assessment of an offender's personal responsibility must consider their state of mind at the time of the offence. A non-exhaustive list of relevant factors are provided:

- the level of planning and/or intentionality brought to the crime;
- the degree, nature and extent of the offender's personal participation in the offence;
- the means or method by which the crime was committed;
- the motive or reasons for the offender's participation;
- the offender's awareness of the legal and moral wrongfulness of their conduct;
- their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and
- their persistence in perpetrating the offence despite that awareness.

[48] In *C.K.*, the Court of Appeal reminded us that sentencing judges must engage in a close examination of moral blameworthiness consistent with the harm-focused framework established by the Supreme Court in *Friesen* (*C.K.* at paras. 58 and 73). The Court of Appeal reminded sentencing judges to ensure that close consideration and proper effect be given to the significant harm caused to the victim and to not pay undue attention to the offender's personal mitigating circumstances. This is because to do so risks failing to give effect to the moral blameworthiness analysis mandated by *Friesen* in cases involving sexual offences against children: *C.K.* at paras. 61, 63, 68-74.

[49] As discussed above, the Supreme Court of Canada in *Friesen* at para. 51 discussed some of the harms of child pornography including that it:

- traumatizes children and violates their autonomy and dignity by treating them as sexual objects;
- causes harm that may stay with them for their entire lifetime; and
- it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity.

- [50] These harms are at the forefront of my mind during my consideration of a proportionate sentence for Mr. Harroff. I have no doubt that the then 13 year-old D.V. was traumatized by the experience she endured that evening. Her traumatization has continued in the years since then as a result not only of the sexual assaults but also as a result of the creation and distribution of the videos of those sexual assaults.
- [51] It is important to recognize that the videos themselves have significantly and permanently harmed D.V. separate and apart from the harm caused by the sexual assaults. It is well understood that once a video or image is shared electronically, it exists forever and its dissemination cannot be controlled. It may be that the videos will re-surface at some time in the future and be brought to D.V.'s attention. Undoubtably, this would re-traumatize D.V. and cause her to suffer further humiliation and injury to her dignity. Even if the videos never resurface, the fact that they might at any time is a possibility that D.V. will have to live with for the rest of her life. The very fact of their existence will affect the way in which D.V. lives her life and the choices she makes, both personally and professionally. The effect of the uncertainty she must live with, and the possibility of experiencing such re-traumatization or humiliation, should not be overlooked nor underappreciated. Mr. Harroff, as creator of the videos, bears responsibility for these harms.
- [52] In my view, the gravity of the offence is significant. The relative gravity of the offence is, in part, reflected in Parliament's decision to increase the maximum penalty for both offences from 10 to 14 years in 2015. While the nature of the creation and distribution of child pornography in this case may be comparatively less serious than in cases where an offender has created and distributed a large amount of child pornography with the knowledge and intent to exploit children, the circumstances of the way in which these offences were committed, and the harm caused, as discussed above, lead me to conclude that the offences committed by Mr. Harroff are very serious indeed.
- [53] Upon consideration of the relevant factors, I find Mr. Harroff to have a relatively high degree of moral responsibility for the offences he had pleaded guilty to. On the evidence before me, I accept that the Mr. Harroff did not engage in a high level of planning in respect of the offences. Indeed, it appears that the offences were committed in circumstances that might be described as impulsive. Despite this, the level of intentionality was high and the creation and dissemination of the videos was no accident; to commit the offences, Mr. Harroff deliberately took a number of actions and made a number of decisions including: pointing his mobile device at the sexual activity that was taking place; deciding to record it, pressing a button to record the activity; determining who to send it to; and pressing the buttons in order to send it to those people. From the ASF, it appears that he did this twice or at least recorded and distributed two incidents of sexual activity.

- [54] Mr. Harroff is not directly responsible for the sexual assaults that occurred that evening. However, he is uniquely responsible for the creation and distribution of the videos of those sexual assaults. It is the creation and distribution of those videos that are the offences that Mr. Harroff has pleaded guilty to. Therefore, in my view, Mr. Harroff's degree, nature and extent of participation in the offences are all on the very high end of the scale and thus indicate a relatively high level of moral blameworthiness.
- [55] I accept that Mr. Harroff, unlike many offenders convicted of child pornography related offences, was not driven by pedophilic tendencies and did not intend to make the videos available as child pornography in the same manner as many offenders do. As discussed above, Mr. Harroff says that he made the decision to start filming because other people were laughing and he believed it was funny at the time. He says he shared the videos as a means of engaging with an inside joke amongst those people who are present that evening. While I find it very difficult to see how such a scene was funny or is properly the subject of an inside joke, I do find that his motive, as compared to others who commit these same crimes, reduces Mr. Harroff's moral culpability to a degree.
- [56] While Mr. Harroff's actions may have been impulsive that night, there is nothing before me which would indicate that he lacked an awareness of the actual or reasonably foreseeable harms flowing from creating and disseminating the videos. These harms may not have been at the forefront of his mind at the time; however, Mr. Harroff, as an 18 year old person familiar with the use of social media ought to have known of the harm that could flow from the dissemination of those videos. At the same time, I have considered that Mr. Harroff did not likely subjectively know that D.V. was being sexually assaulted at the time which would effect his awareness of the harm that could flow from his actions.
- [57] I must also consider Mr. Harroff's awareness of the legal and moral wrongfulness of his conduct that evening. According to the ASF, Mr. Harroff did not know that D.V. was 13 years of age before or during his presence at the house party that evening. He became aware of her age approximately two to three weeks after the incident at which time I'm told he deleted the videos. This somewhat attenuates his moral blameworthiness as it indicates of a lack of intent to intentionally exploit a young child. However, there are a number of other factors that lead me to conclude that Mr. Harroff should nonetheless have been very aware that creating and distributing the videos was legally and morally wrong.
- [58] First, Mr. Harroff has admitted that during the house party and before recording the sexual activity, he had heard from individuals that D.V. was 17 or 18 years old. Thus, he was subjectively aware that D.V. might have been a child. Given D.V.'s appearance as a relatively young person in court some three years after the night in question, and given the ambiguous nature of his knowledge of her age, I find it difficult to accept that Mr. Harroff should not have had reason to question whether D.V. was an adult or a child at that time. In these circumstances, Mr. Harroff bears moral responsibility for not taking reasonable steps to confirm her age.

- [59] Furthermore, the circumstances of the sexual activity that Mr. Harroff witnessed and recorded, in my view, should have led Mr. Harroff to further question whether creating and distributing the videos was clearly wrong. The sexual activity consisted of a relatively young-looking person engaged in explicit sexual activity and having sexual intercourse with two males in two locations in the house. It is undeniable that the sexual activity as described in the ASF was objectively degrading: one video involved sexual intercourse on a toilet in a bathroom where another individual enters the bathroom, grabs D.V. in the breast area from behind and urinates on her. Alcohol had been consumed by attendees both before and at the house party. While he may not have known that D.V. was being sexually assaulted - red flags should certainly have been raised.
- [60] Regardless of D.V.'s age, these circumstances should have alerted Mr. Harroff to the very real possibility that D.V. was not a consensual participant in the sexual activity and certainly was not consenting to the creation and distribution of the recordings, which would have been a crime regardless of her age. Thus, while I accept that Mr. Harroff does not bear moral fault for the intentional sexual exploitation of a 13 year old child, in all of the circumstances I have described above, I find that Mr. Harroff's moral fault is nonetheless significant given his failure to take reasonable steps to confirm D.V.'s age or whether she was a willing participant in that sexual activity (keeping in mind that D.V. can not have legally consented to the activity given her age and the age of her assailants).
- [61] The Ontario Court of Appeal came to a similar conclusion in respect of the failure to take reasonable steps in *R. v. Joseph*, 2020 ONCA 733 at para. 127. In that case, which also involved the creation of child pornography by a youthful offender who it had been found did not intend to exploit children, the Court held that:

The obligation to take reasonable steps before engaging youthful individuals in sexualized activity is a heavy one, and the failure to discharge that obligation is not to be taken lightly.

- [62] I would say that the obligation to take reasonable steps before recording youthful individuals engaged in sexual activity of any nature, much less of the explicit nature that D.V. was subjected to here, is as equally heavy. There is no evidence before me that Mr. Harroff took any steps at all in this respect and his failure to discharge his obligation to do so is a factor tending to increase his moral blameworthiness.
- [63] Nonetheless, I am aware and have also considered that the offences appear to be isolated incidents committed with little forethought. This somewhat reduces Mr. Harroff's moral blameworthiness.

Aggravating and Mitigating Factors

- [64] I will now address the aggravating and mitigating circumstances.

- [65] Aggravating factors are particularly informative of the offender's moral blameworthiness. Section 718.2(a)(ii.1) of the Code deems it to be an aggravating factor if in committing the offence, Mr. Harroff abused a person under the age of 18. Of course, that is the case in any case involving child pornography. Aggravating factors that are part of the definition of the offence should not be double-counted as aggravating factors: Lacasse at para. 16.
- [66] In my view, the significant impact upon D.V., particularly in light of her age, is an aggravating factor pursuant to s. 718.2(a)(iii.1). The ASF provides that the videos were distributed by Mr. Harroff and that he is aware that individuals other than those that he sent them to have also seen them. I have discussed the significant impact that dissemination of child pornography has on its victims in depth earlier.
- [67] That being said, I find that there are a number of mitigating factors in this case.
- Mr. Harroff has pleaded guilty at a relatively early stage. Thus, he has saved judicial resources and has spared D.V. the need to testify and the need to have the videos played in Court;
 - In his statement to the Court at sentencing, Mr. Harroff expressed remorse. His guilty plea is also some evidence of remorse;
 - Mr. Harroff did not have specific knowledge that D.V. was 13 years old. However, in light of my discussion above in respect of his failure to take reasonable steps to ascertain her age in circumstances where, on his own admissions, he thought she may have been 17 years old, diminishes the mitigating effect of his lack of subjective knowledge of her age;
 - Mr. Harroff was 18 years old, and therefore, was relatively young at the time of the offence;
 - Mr. Harroff has no criminal record prior to these offences;
 - Mr. Harroff has adhered to his bail conditions since his arrest; and
 - Mr. Harroff has a stable employment history.

VI. SOIRA REGISTRATION

- [68] Before I discuss the appropriate length and type of sentence for Mr. Harroff, I will address whether or not Mr. Harroff should be exempt from registering under SOIRA.
- [69] Until recently, s. 490.012 of the Code required mandatory registration on the National Sex Offender Registry for offenders found guilty of child sexual offences, including the offences of making and distributing child pornography. However, the Supreme Court of Canada struck down this provision in *R. v. Ndhlovu*, 2022 SCC 38, because it violated s. 7 of the Charter and could not be justified under s. 1.

- [70] Under the amended legislation, if the sentence is less than two years and there is no related prior conviction, an order for registration ought to be made unless: (1) there is no connection between making the order and helping investigate sexual crimes; or (2) the impact on the offender outweighs harms to the public interest of having them register. The Crown takes the position that Mr. Harroff should not be exempted from registration.
- [71] The Crown's position on sentencing is that an appropriate sentence is two years less a day. As will be discussed further below, I have determined that an appropriate sentence is indeed less than two years. Mr. Harroff has no previous convictions. Given this, Mr. Harroff meets the pre-conditions to be considered for exemption and I have the discretion to exempt Mr. Harroff from registration.
- [72] In the circumstances of this case, I am satisfied that I should exercise that discretion. I find that requiring Mr. Harroff's registration with the Sex Offender Registry would not advance the objectives of the SOIRA regime.
- [73] The majority in Ndhlovu described the objective of SOIRA as "capturing information that may assist police prevent and investigate sex offences": at para. 92. The ongoing registration requirements are "numerous, invasive and extensive": at para. 5. Registering offenders who are not at an increased risk of reoffending "bears no connection" to the purpose of the SOIRA regime: at para. 79.
- [74] As discussed above, although I do not have the benefit of a psychological assessment, I am satisfied that Mr. Harroff is at a low risk to reoffend given the general tenor of the PSR and the Crown's position on this point. Moreover, as outlined below, the isolated circumstances of the offence, mixed with Mr. Harroff's personal circumstances, support a finding that Mr. Harroff has no increased risk of reoffending.
- [75] Mr. Harroff is a young, first-time offender. There is no indication that he is sexually attracted to children and, while Mr. Harroff failed to take reasonable steps to ascertain the victim's age, I do not believe he set out to intentionally exploit a child by making and distributing the videos. Unlike many cases involving child pornography, I accept that Mr. Harroff did not have a pedophilic sexual motivation for creating and distributing the videos.
- [76] Because of his low likelihood to reoffend, I find that Mr. Harroff poses little to no risk to the community or children. And connected to his low likelihood of reoffending, I find it therefore unlikely that Mr. Harroff's registration under SOIRA would ever assist police in investigating or preventing offences of this nature going forward. Mr. Harroff has not demonstrated a historical pattern or future likelihood of making, possessing or distributing child pornography. There is no indication that Mr. Harroff is sexually attracted to or aroused by children. He has shown remorse for his actions.
- [77] In coming to this conclusion, I have considered several authorities. I find Mr. Harroff's circumstances to be more similar to cases where the offenders were exempted from registration such as: *R. v. Schatz*, 2023 ONCJ 529; *R. v. Nassr*, 2023 ONSC 6040; *R. v. T.C.S.T.*,

2023 BCSC 1656; Ndhlovu; R. v. Hart, 2023 BCSC 933; and R. v. Shokouh, 2023 ONSC 1848. I find Mr. Harroff's case is sufficiently different from cases in which courts have chosen not to exercise their discretion on the SOIRA exemption: for example, in R. v. Tarleton, 2023 ABCJ 274, R. v. Riossi, 2023 ONSC 3812, and R. v. C.R.J., 2023 BCSC 1151.

[78] Mr. Harroff will not be required to register under SOIRA.

VII. The Appropriate Sentence for Each Count

[79] Before I consider whether a CSO is appropriate, I must first determine what an appropriate sentence for Mr. Harroff would be in the circumstances of this case. Once I have determined the appropriate sentence, I will then move on to consider whether it would be appropriate for that sentence, or some other sentence, to be served in the community under strict conditions of house arrest.

[80] As Donegan J. stated in K.M. at para. 105, imposing a just and proportionate sentence in cases involving serious charges such as the ones that Mr. Harroff has pleaded guilty to, is one of the most challenging responsibilities a judge has. I find this to be particularly true in this case given the rather unique circumstances and the way in which those circumstances are not necessarily a typical fit for the offences at issue or for the offences of distributing intimate images without consent which counsel has relied upon for guidance. However, no matter how challenging it is, it is this Court's job to come to a just and proportionate sentence while keeping in mind that doing so is a highly individualized exercise that involves a careful balancing of "a variety of factors in the context of a particular set of circumstances in respect of a particular offender".

[81] There are a number of considerations that are specific to the particular offences that Mr. Harroff has pleaded guilty to in this case. As discussed above, s. 718.01 of the Code requires me to give primary consideration to the objectives of denunciation and deterrence when determining Mr. Harroff's sentence. While Mr. Harroff's personal circumstances remain relevant in determining a proportionate sentence, they play a lesser role.

[82] Parliament provided for mandatory minimum sentences of one year for each offence. However, the mandatory minimum sentences for making child pornography (s. 163.1(2)) and transmitting child pornography (s. 163.1(3)) have both been found to be unconstitutional by this Court: K.M., and R. v. Mollon, 2019 BCSC 423.

[83] Nonetheless, it is clear that Parliament intended that the punishment for these offences should be significant. Parliament's intent in this respect is reflected by its decision to increase the maximum penalty for both offences from 10 to 14 years in 2015. I agree with Donegan J.'s conclusion at para. 117 of K.M. that these increases in maximum sentences indicate that Parliament: "wants such offences to be punished more harshly and should 'thus be understood as shifting the distribution of proportionate sentences for an offence': Friesen at para. 97"

- [84] The relative severity of the punishment associated with these offences should come as a surprise to no one considering the degrading, dehumanizing and objectifying role that child pornography plays. Donegan J. aptly summarized the Court of Appeal's decision in *R. v. Athey*, 2017 BCCA 350 at para. 34, where she stated that child pornography is "inherently harmful and its very existence violates the dignity and equality rights of children, preying on their vulnerabilities." In *Friesen* at para. 51, the Court referenced its earlier decision in *Sharpe* and further discussed the harms of child pornography:
- [51] The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. This Court recognized the importance of these interests in *Sharpe* in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime (para. 92, per McLachlin C.J., and para. 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.). Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity (see *Sharpe*, at paras. 172, 174 and 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.).
- [85] To this I add the strong message sent by the Supreme Court of Canada in *Friesen* in respect of sentencing for crimes involving sexual violence against children:
- [1] Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against children deny thousands of Canadian children such a childhood every year. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.
- [5] we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.
- [42] Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the Criminal Code. Our society is committed to protecting children and ensuring their rights and interests are respected (*Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 67). As Otis J.A. stated in *R. v. L. (J.-J.)* (1998), 1998 CanLII 12722 (QC CA),

126 C.C.C. (3d) 235 (Que. C.A.), [TRANSLATION] "the protection of children constitute[s] one of the essential and perennial values" of Canadian society (p. 250). Protecting children from becoming victims of sexual offences is thus vital in a free and democratic society (R. v. Mills, 2019 SCC 22, [2019] 2 S.C.R. 320, at para. 23).

- [86] As referenced earlier, the particular circumstances of the offences and the offender in this case are not the circumstances typically referred to in the jurisprudence involving sentencing for child pornography related offences. They are also not significantly similar to the cases involving the distribution of intimate images without consent.
- [87] Unlike most child pornography cases, there is no evidence of Mr. Harroff having pedophilic tendencies. Nor is there evidence that Mr. Harroff intended to exploit a child by creating and transmitting the videos. The production and transmission in this case was an isolated incident that took place over a very short period of time. And although it is not in the ASF, the Crown advises that Mr. Harroff deleted the videos once he found out that D.V. was in fact 13 years old.
- [88] However, I find Mr. Harroff's moral blameworthiness to be relatively high, for the reasons discussed above. And moreover, there is no doubt that the impact upon D.V. has been, and will continue to be, devastating. Nonetheless, I have considered the very unique circumstances of this case, including Mr. Harroff's lack of planning, lack of intent to exploit a child and relatively impulsive nature of the offences.
- [89] I have carefully considered the legal framework I have discussed above, the Supreme Court of Canada's directions in Friesen, and the direction of our Court of Appeal in C.K. I have considered the personal circumstances of Mr. Harroff, including the mitigating circumstances identified above, while taking care to ensure that those personal circumstances do not overtake the consideration of the impact that the offences have had on D.V. Although I find them to be of limited assistance, I have taken guidance from the sentencing jurisprudence referenced above.
- [90] Upon consideration of all of these factors, I have determined that a just and proportionate sentence in the circumstances of this case is eight months imprisonment for making child pornography contrary to s. 163.1(2) of the Code; and eight months imprisonment for transmitting child pornography contrary to s. 163.1(3) of the Code.

Is a Conditional Sentence Order Appropriate

- [91] Given that I have found that the appropriate sentence for each count in this case is less than two years, and given that the mandatory minimum sentences for these offences have been struck down, it is open to this Court to impose a CSO in which Mr. Harroff would serve his sentence in the community under a form of house arrest as an alternative to a term of imprisonment if the other requirements of s. 742.1 of the Code are met.

The Parties' Positions

- [92] Mr. Bauder, on behalf of Mr. Harroff, submits that a fit sentence would be an 18-month CSO with strict conditions of house arrest followed by one year of probation. He also submits that Mr. Harroff accedes to the need for sex offender counselling and that he has no opposition to participating in such programming.
- [93] Mr. Wightman, on behalf of the Crown, does not advance a position that Mr. Harroff would be particularly unsuitable for a CSO or that he would not comply with the conditions of house arrest. Rather, as I understand its position, the Crown says that in circumstances such as these, a custodial sentence is necessary to meet the objectives of denunciation and deterrence.
- [94] I have been provided with very little jurisprudence in support of either the Crown's or defence's positions. Neither counsel nor the Court could find a reported decision where the circumstances were similar to the case at hand. In this way, the circumstances of the offences and the offender are somewhat unique, at least in a jurisprudential sense. However, given the ubiquitous nature of cell phones with cameras in this day and age and the way in which young people are apt to record many aspects of their lives, I am doubtful, unfortunately, that this situation is as unique in society as it is in the jurisprudence.
- [95] Mr. Bauder acknowledges that offenders whose intent was to produce and broadcast child pornography widely have attracted lengthy custodial sentences. However, he says the facts of this case are different, and in particular he points to Mr. Harroff's lack of intent or planning in making the videos and Mr. Harroff's poor decision-making in doing so.
- [96] In support of the availability of a CSO for the offences that Mr. Harroff faces, Mr. Bauder relies on the Alberta Court of Appeal's decision in *R v. Friesen*, 2022 ABCA 147 [Friesen ABCA]. As far as I can tell, this decision of the Alberta Court of Appeal bears no relation to seminal decision of the Supreme Court of Canada. In that case, the Alberta Court of Appeal did not overturn the sentencing judge's decision to impose a CSO for possession of child pornography. Mr. Bauder also relies upon *R. v. Mitchell*, 2021 BCPC 246, in which the provincial court judge sentenced the offender to a CSO in respect of a charge of child pornography.
- [97] Mr. Bauder also refers to decisions in which teenagers have distributed intimate images without consent and submits that depending on the circumstances in those cases, CSO's were sometimes imposed and sometimes they were not. He also points to cases in which CSOs were ordered in respect of convictions for sexual interference, although I note that *R. v. Scofield*, 2019 BCCA 3, was decided before the Supreme Court of Canada's decision in *Friesen*.

Analysis

- [98] Under s. 742.1(b) of the Code, I must be satisfied that two conditions are met before imposing a CSO. First, I must be satisfied that service of the sentence in the community would not endanger the safety of the community. As discussed above, I do not find that Mr. Harroff poses a high risk of re-offending or a risk to the public. Moreover, as I understand the Crown's position, it is not making the submission that a CSO should not be imposed for public safety reasons. In the unique circumstances of this case, I am satisfied that the safety of the public would not be endangered if Mr. Harroff was to serve his sentence in the community.
- [99] However, that does not end the inquiry. Pursuant to s. 742.1(b), I must also be satisfied that serving the sentence in the community "would be consistent with the fundamental purpose and principles of sentencing" set out in the Code. As discussed earlier, Parliament has determined that the primary objectives of sentencing for the offences in this case are deterrence and denunciation. The appropriateness of a CSO must be considered in this context.
- [100] In *R. v. Proulx*, 2000 SCC 5 at para. 127, the Supreme Court of Canada held that CSOs are usually better at achieving "the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community." While CSOs may provide sufficient denunciation and deterrence, the Court held that "[w]here objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction."
- [101] Our Court of Appeal has held that, save for exceptional circumstances, incarceration is necessary for those convicted of child pornography offences in order to appropriately emphasize the principles of denunciation and deterrence: *R. v. Alexander*, 2019 BCCA 100 at paras. 39-42 and *R. v. Swaby*, 2018 BCCA 416 at para. 67. I note that both of these decisions pre-date the Supreme Court of Canada's decision in *Friesen*. In my view, the Supreme Court's directions to sentencing judges in *Friesen* can fairly be said to have emphasized, rather than weakened, the Court of Appeal's conclusions in *Swaby* and *Alexander* in respect of the usual need for incarceration for child pornography offences.
- [102] The Court of Appeal's decision in *Alexander* was recently discussed and applied by Justice Gaul in *R. v. Tellier*, 2023 BCSC 1853. In that decision, Gaul J. held that a CSO imposed by a provincial court judge was not a fit sentence in a case involving child pornography. Gaul J. considered the relevant authorities and concluded that:
- [46] While exceptional circumstances are not a prerequisite for the imposition of a conditional sentence order, our Court of Appeal in *Alexander* has made it patently clear, in my view, that in all cases of child pornography, a conventional custodial sentence will be called for, except where there are exceptional circumstances.

While this distinction may be rather fine, I take it to mean that proportionality and the appropriate emphasis on denunciation and deterrence almost always demands a carceral sentence in child pornography cases.

[103] The jurisprudence does not set out exactly what will qualify as exceptional circumstances that would render a CSO appropriate. I have considered cases in which CSOs were ordered for child pornography related offences including *Swaby, R. v. Bisson*, 2020 BCSC 1778; *R. v. Cole*, 2021 BCSC 293; and *R. v. Goodell*, 2021 BCSC 735. I tend to agree with the provincial court judge who in *R. v. Smith*, 2023 BCPC 188 at para. 62 summarized the threshold to be met for exceptional circumstances this way:

To meet this high threshold, the offender would have no criminal record, was otherwise of good character, whose degree of responsibility was reduced by reason of their limited cognitive functioning or mental illness, which was causally connected to their criminal behaviour.

[104] More guidance as to what is "exceptional" comes from *Gaul J. in Tellier* at para. 44:

exceptional cases or exceptional circumstances that make a case exceptional are circumstances that demonstrate that the offender's life, both before and after the offence in question, show a marked and material improvement or a significantly reduced degree of moral blameworthiness.

[105] While there is no definitive list of considerations that may make a case or an offender "exceptional", what is required, in my view, is that the circumstances of the individual or the case must be exceptional such that the offender has a significantly reduced level of moral blameworthiness. This makes sense because such a significantly diminished level of moral blameworthiness may mean that a CSO will be a proportionate sentence, even where denunciation and deterrence are to be the primary considerations in determining the appropriate sentence.

[106] Mr. Bauder submits that both Mr. Harroff and the case itself are exceptional such that a CSO is appropriate. He particularly emphasizes Mr. Harroff's young age, guilty pleas and other indications of remorse, as well as his willingness to engage in treatment, and the support he enjoys and receives from his parents.

[107] Mr. Bauder also emphasizes Mr. Harroff's lack of criminal record or interaction with the criminal justice system prior to these offences. He also points to Mr. Harroff's compliance on relatively strict bail conditions for the two years since his arrest in support of his argument that Mr. Harroff is an appropriate candidate for a CSO.

[108] Mr. Bauder submits that Mr. Harroff has accepted responsibility for the offences and further notes that there is no pattern of offending and that protection of the community is not a live issue in this case. He characterizes the events in question as being an isolated incident arising from Mr. Harroff's impulsivity.

- [109] While acknowledging that ignorance is no defence, Mr. Bauder further says that Mr. Harroff did not think his actions were illegal at the time he made the videos and that this too is an exceptional circumstance. However, I place limited weight on this factor for the reasons discussed above in respect of Mr. Harroff's recklessness or wilful blindness to D.V.'s age. In any event, there is no reasonable way in which one could conclude that Mr. Harroff's behaviour was not criminal. Even if D.V. had been an adult, it would have been a crime to distribute those videos without her consent.
- [110] In my view, the factors pointed to by Mr. Bauder in support of his argument that Mr. Harroff's circumstances are exceptional are better characterized as mitigating circumstances. None of these circumstances significantly reduce Mr. Harroff's moral blameworthiness such that a CSO would be appropriate. Mr. Harroff suffers from no mental illness or limited cognitive functioning that was casually, or in any way, related to the criminal behaviour. I have already considered the factors pointed to by Mr. Bauder in my discussion of Mr. Harroff's moral blameworthiness and in my determination of the appropriate sentence.
- [111] I find this case to be distinguishable from Friesen ABCA. In that case, the Alberta Court of Appeal held that a CSO was appropriate because of two exceptional circumstances discussed at paras. 56-57. The first being that the offender suffered collateral consequences (the complete loss of his musical career) greater than those normally suffered by offenders convicted of child pornography. The second exceptional circumstance was that the offender had deep insight into the wrongfulness of child pornography, was remorseful, "had taken considerable steps to treat his predilection for child pornography and was completely rehabilitated." None of these circumstances are present in the case at bar. In any event, if they had been present, I am not certain that this focus on the offender's personal circumstances would qualify as exceptional under the guidance provided by our Court of Appeal.
- [112] As discussed earlier, in the particular circumstances of this case, I find Mr. Harroff's moral blameworthiness to be relatively high. There is nothing in the personal circumstances relied upon by Mr. Bauder which would lead me to a different conclusion when it comes to determining whether a CSO is appropriate. In my view, to accede to Mr. Bauder's argument would be to place too much emphasis on Mr. Harroff's personal characteristics at the expense of the appropriate consideration of his moral culpability. As Gaul J. stated at para. 30 of Tellier, when the principles of denunciation and deterrence are paramount, I am to focus on the circumstances of the offence, including its impact on the victim, rather than on Mr. Harroff's personal circumstances.
- [113] Mr. Bauder argues that the circumstances of this case are also exceptional such that a CSO would be warranted. He emphasized that he was unable to find a case exactly on point. He points to the fact that the people at the party were relatively young including Mr. Harroff, that alcohol was involved, that the decision to record the sexual activity was made "spur of the moment" and that Mr. Harroff "only" distributed the videos to others who were present

at the party. While the circumstances may be jurisprudentially unique, that uniqueness does not necessarily mean the circumstances are exceptional such that a CSO would be appropriate.

- [114] Mr. Bauder submits that the age of social media and young people's propensity to video or record so many aspects of their lives has changed the landscape. As I understand this part of his argument, Mr. Bauder cautions the Court from too harshly punishing young people that engage in behaviour that has taken on an element of commonality. While I understand the landscape may have changed such that young people do engage with social media and mobile recording devices in ways that did not exist in the past, the circumstances of this case are not the same as those where young people exchanged consensually created photos and videos beyond those that they were originally intended for. The context of the offences in this case are substantively different than those circumstances.
- [115] Regardless, the changing landscape arising from the proliferation of social media does not change the fundamental nature of the behaviour that Mr. Harroff engaged in that evening. Most importantly, it does not change the fact that he deliberately recorded a young person engaged in explicit and objectively degrading sexual activity and distributed those videos to other individuals, apparently without any forethought of the fact that those videos would likely be further distributed. And not surprisingly, unfortunate as that may be, it was distributed further.
- [116] While Mr. Harroff might not have known D.V. was only 13 years old, he did know she was young, and on his own admission, that she could have been a child. Yet he went ahead anyway - why? Because he inexplicably thought it was funny. His thoughtless act that evening, no matter how impulsive it was, has had a devastating impact on D.V. that will continue for the rest of her life.
- [117] I find the cases in which CSOs have been ordered for child pornography offences to be distinguishable from this case and this offender. In my view, none of the circumstances identified by Mr. Harroff are such that they justify a departure from the usual sentencing practices in child pornography cases.
- [118] Given Mr. Harroff's moral blameworthiness, a CSO would not adequately address the fundamental principles of sentencing. In particular, in the circumstances of this case and this offender, a CSO would not adequately denounce the conduct that Mr. Harroff engaged in that evening nor would it adequately denounce the harm done to D.V. Similarly, in my view, a CSO would not adequately deter others from committing these offences should they find themselves in similar circumstances.
- [119] Thus, I find that a sentence of incarceration is required.

- [120] The Crown urges me to order that Mr. Harroff's sentences for each offence be served consecutively. It is open to me to impose consecutive sentences given that the offences of making and distributing child pornography each engage a different societal interest: *R. v Reynard*, 2015 BCCA 455, at para. 18.
- [121] However, given the circumstances of this case, in my view, Mr. Harroff's sentences for making and distributing child pornography should be served concurrently. Mr. Harroff's actions in recording the sexual activity on his phone and sending the videos to his friends on Snapchat, are part of a linked series of acts such that they form a single endeavour: *Friesen* at para. 155, *R. v. G.P.W.*, (1998), 106 B.C.A.C. 239 (C.A.) at para. 35. The making and distributing of the videos occurred very temporally close together and Mr. Harroff's purpose in making the video was to share it on social media. There is no evidence before me that Mr. Harroff made the video to keep as, for example, a part of a collection of child pornography. It is my view that the offences in these particular circumstances arise out of the same transaction. Therefore, I have exercised my discretion to have Mr. Harroff serve his sentences concurrently.
- [122] Mr. Harroff, I sentence you to eight months imprisonment on the count of making child pornography. You are also sentenced to eight months imprisonment on the count of distributing child pornography. These sentences are to be served concurrently; consequently, you are sentenced to a total of eight months imprisonment.

VIII. PROBATION CONDITIONS

- [123] Following the completion of your sentence of imprisonment, you are sentenced to 18 months of probation. During this probation you will be subject to the following conditions:
- You must keep the peace and be of good behavior.
 - You must appear before the court when required to do so by the court.
 - You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the officer of any change of employment or occupation.
 - You must report in person to a probation officer at the Community Corrections Centre on 100th Street in Fort St. John within two business days after your release from custody unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different time frame. After that, you must report as directed by your officer.
 - You must have no contact or communication, directly or indirectly, with D.V.
 - You must attend, participate in and complete any intake, assessment, counselling, or education program as directed by your probation officer. This may include but is not limited to counselling or programming for sexual offence prevention.

IX. ANCILLIARY ORDERS AND VICTIM SURCHARGE

[124] Both counts on the indictment are primary designated offences. Pursuant to s. 487.051(1) of the Code, I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Databank. The samples will be taken from you while you are in jail and you must submit to the taking of the samples.

[125] You must pay a victim surcharge in the amount and at the time prescribed by the Code.

"Majawa J."

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